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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In Re:

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION,

Debtor.

Case No. 23-30662-HLB
Chapter 11

**NLRB'S BRIEF IN SUPPORT OF DEBTOR'S EX PARTE APPLICATION FOR THE
ENTRY OF AN ORDER PROVIDING THAT THE AUTOMATIC STAY DOES NOT
APPLY TO THE NINTH CIRCUIT'S PROCEEDINGS
ENFORCING OR VACATING AN ORDER BY THE NLRB**

The National Labor Relations Board ("the NLRB") submits this Brief in Support of the Debtor's *ex parte* application for an order providing that the automatic stay does not apply to consolidated enforcement and review proceedings pending in the Ninth Circuit pursuant to Sections 10(e) and (f) the National Labor Relations Act, 29 U.S.C. §§ 160(e), (f) (the "NLRA") ("Debtor's Application") [ECF No. 72]. For the reasons identified in the Debtor's Application, and those discussed below, this Court should enter an order pursuant to Section 362(b)(4) of

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Title 11 of the Bankruptcy Code [11 U.S.C. § 362], finding that the automatic stay does not
2 apply to the Ninth Circuit's consolidated proceedings, which seek to enforce or review a final
3 order of the NLRB.

4 **I. Background**

5 On April 6, 2023, the NLRB issued its Decision and Order (the "Board Order") against
6 the International Longshore and Warehouse Union ("ILWU" or "Debtor"). 372 NLRB No. 66
7 (2023). The Board Order requires, among other things, that the Debtor cease pursuing lost work
8 opportunity claims against SSA Terminals, LLC, concerning work that employees represented
9 by the International Association of Machinists and Aerospace Workers ("IAM") are currently
10 performing. *Id.* at *3.

11 Three petitions for review of the Board's Order were subsequently filed with the Ninth
12 Circuit Court of Appeals, including *International Longshore and Warehouse Union and*
13 *International Longshore and Warehouse Union, Local 19 v. NLRB* (Docket No. 23-632); *Pacific*
14 *Maritime Association v. NLRB* (Docket No. 23-658); and *International Association of Machinists*
15 *and Aerospace Workers, District Lodge 160, Local Lodge 289 v. NLRB* (Docket No. 23-793). On
16 April 27, 2023, the NLRB filed a cross-application for enforcement of the Board Order in the
17 Ninth Circuit in *NLRB v. International Longshore and Warehouse Union, et al.* (Docket No. 23-
18 780). On June 13, 2023, the Ninth Circuit issued an order consolidating the NLRB's cross
19 application for enforcement with the three petitions for review. (Docket No. 23-780, ECF No.
20 16).

21 Importantly, in the consolidated cases pending in the Ninth Circuit, the NLRB is not
22 seeking to collect money; instead, it is seeking solely to affix liability under the NLRA. The
23 NLRB's order includes no monetary liability.

1 On October 4, 2023, the ILWU notified the Ninth Circuit of the instant bankruptcy
2 proceeding, and on October 9, 2023, the IAM filed a notice asking the Ninth Circuit to stay the
3 consolidated cases due to the filing of the ILWU's Bankruptcy Petition. (Docket No. 23-780,
4 ECF Nos. 19 and 20). On November 2, 2023, the Ninth Circuit stayed the consolidated appellate
5 proceedings pursuant to the automatic stay imposed by the filing of the ILWU's bankruptcy
6 petition. (Docket No. 23-780, ECF No. 22).

7 The ILWU then filed with this Court, its *Ex Parte* Motion for Relief from Stay and a
8 declaration in support of that motion on November 7, 2023. (ECF Nos. 72 and 73). Its filing was
9 later corrected as ordered by the Court in its November 14, 2023 Docket Text Order to include
10 the proper cover sheet. (ECF No. 98). On November 9, 2023, the IAM filed a Memorandum in
11 Opposition to the ILWU's *Ex Parte* Motion for Relief from Stay. (ECF No. 79). On November
12 30, 2023, the IAM filed a Further Opposition to Motion for Relief from Stay. (ECF No. 104). On
13 December 4, 2023, the Court struck the IAM's Further Opposition. (Docket Text Order, Dec. 4,
14 2023). The Court has scheduled a hearing on the ILWU's motion to take place on December 7,
15 2023. (ECF No. 80).

16 **II. The consolidated proceedings before the Ninth Circuit are being litigated**
17 **pursuant to the NLRB's police and regulatory power and therefore are excepted**
from the automatic stay.

18 1. The NLRB's Cross-Application for Enforcement is excepted from the automatic stay.

19 Generally, Section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy
20 petition operates as an automatic stay of proceedings against a bankruptcy debtor. 11 U.S.C.
21 § 362; *NLRB v. Cont'l Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991) (Section 362 of the
22 Bankruptcy Code "generally functions as a stay to all other proceedings against the debtor.").
23 However, Section 362(b)(4) provides that the automatic stay does not apply to "the
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1 commencement or continuation of an action or proceeding by a governmental unit...to enforce
2 its police or regulatory power.” *Id.* This exception to the stay authorizes governmental units to
3 pursue “the enforcement of a judgment other than a money judgment, obtained in an action or
4 proceeding by the governmental unit to enforce [its] police or regulatory power.” *Id.* As plainly
5 stated in the statute, the only limitation built into this exception is that the government is
6 precluded from enforcing a “money judgement.” *Id.*

7 The NLRB is an independent regulatory agency of the United States Government,
8 statutorily vested with the responsibility for administering and enforcing the NLRA. *See id.* at
9 832-33. Under the NLRA, Board orders are subject to review *only* in the United States Courts of
10 Appeals. *See* 29 U.S.C. § 160(e) (authorizing NLRB to petition the court for enforcement of a
11 Board order) and § 160(f) (authorizing any aggrieved person to seek appellate review of a Board
12 order). Thus, the NLRB cannot enforce its own orders, but rather, must rely on the courts of
13 appeals to enter judgments enforcing the NLRB’s orders. *Myers v. Bethlehem Shipbuilding*
14 *Corp.*, 303 U.S. 41, 48 (1938).

15 The Ninth Circuit has affirmed that NLRB enforcement proceedings in the courts of
16 appeals brought under Section 10(e) of the NLRA, 29 U.S.C. § 160(e), fall squarely within the
17 police and regulatory exception to the automatic stay. *Cont’l Hagen Corp.*, 932 F.2d at 833-35;
18 *NLRB v. Twin Cities Elec.*, 907 F.2d 108 (9th Cir. 1990). Indeed, there is “widespread agreement
19 among the circuits” that government agencies such as the NLRB, are governmental units
20 authorized to maintain actions to enforce their police or regulatory power as defined in Section
21 362(b)(4) of the Bankruptcy Code. *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983)
22 (per curiam); *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992) (per
23 curiam); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). (per curiam); *NLRB v.*
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1 *Edward Cooper Painting, Inc.*, 804 F.2d 934, 941 & n.6 (6th Cir. 1986); *NLRB v. P*I*E*
2 *Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991). The IAM appears to concede this point in its
3 opposition to the Debtor's Application, stating that "[c]ourts have generally not stayed cases in
4 Courts of Appeals where the [NLRB] has sought enforcement of Board Orders..." [ECF 79, p. 4,
5 line 9-11]. As shown below, the NLRB's enforcement proceeding before the Ninth Circuit is
6 precisely the type of action that is excepted from the automatic stay.

7 The Ninth Circuit has applied two tests to evaluate whether a government action is, in
8 fact, within the scope of the police and regulatory exception: the pecuniary purpose test and the
9 public policy test. *Cont'l Hagen Corp.*, 932 F.2d at 833-34; *City & County of San Francisco v.*
10 *PG&E Corp.*, 433 F.3d 1115, 1124 (9th Cir. 2006). Under the pecuniary purpose test, the court
11 must determine "whether the government action relates primarily to the protection of the
12 government's pecuniary interest in the debtor's property or to matters of public safety and
13 welfare." *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997) (citing *Cont'l*
14 *Hagen*, 932 F.2d at 833). Here, the Board Order subject to the Ninth Circuit proceedings directly
15 imposes no financial liability on ILWU; therefore, the NLRB is not seeking to protect any
16 pecuniary interest in the Debtor's property that would result in the NLRB obtaining an advantage
17 over creditors in the bankruptcy proceeding. Instead, the NLRB's action to enforce the Board
18 Order, and therefore the NLRA, is designed to serve the public interest in the rights protected by
19 the statute by imposing cease and desist and affirmative obligations upon ILWU to remedy its
20 violations of the NLRA, as explained further below.

21 Under the public policy test, the court must determine whether the government action
22 intends to "effectuate public policy" or to "adjudicate private rights." *Cont'l Hagen*, 932 F.2d at
23 833 (citation omitted). NLRB actions often pass the public policy test as "no private action arises
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1 under the [NLRA]...[T]he NLRB determines which complaints it will act upon in its own name
2 in furthering the policies of the federal labor laws.” *Id.* at 834 (citing *In re Adams Delivery*
3 *Service*, 24 B.R. 589, 592 (B.A.P. 9th Cir. 1982)); *see also NLRB v. Industrial Union of Marine*
4 *and Shipbuilding Wkrs.*, 391 U.S. 418, 424 (1968) (“A proceeding by the Board is not to
5 adjudicate private rights but to effectuate a public policy”). As Congress’s exclusive “agent” to
6 enforce the NLRA, the NLRB’s cross-application for enforcement is clearly an effort to
7 effectuate public policy. *See Nathanson v. NLRB*, 344 U.S. 25, 30 (1952). Without the NLRB’s
8 enforcement action in the Ninth Circuit, ILWU’s violations of the NLRA will go unremedied,
9 and both IAM and the employer of the employees at issue will be without redress. The NLRB is
10 statutorily mandated to enforce the NLRA; this Court should determine the automatic stay does
11 not prevent the NLRB from doing so. Accordingly, under either test, the NLRB’s enforcement
12 action in the Ninth Circuit is exempt from the reach of the automatic stay.

13 2. The Consolidated Appeals Should Not Be Subject to the Automatic Stay.

14 In support of the automatic stay of the consolidated Ninth Circuit proceeding, IAM
15 argues that the NLRB’s police and regulatory exemption from the automatic stay does not apply
16 to private parties such as itself. (ECF 79, pp. 4-5, paras 15-17). But the proceedings initiated by
17 the private party petitions for review are against the NLRB – they are not merely private party
18 litigation. They are just as much exercises of the NLRB’s police or regulatory power as the
19 NLRB enforcement proceeding, as they are the statutory procedure for obtaining judicial review
20 of NLRB final orders. In each case, the NLRB seeks the same regulatory objective it is pursuing
21 in its cross-application for enforcement: securing an enforceable order from the Ninth Circuit
22 pursuant to its congressionally mandated duty under the NLRA. Thus, the NLRB’s function as a
23 respondent in each of the three Section 10(f) appeals is substantially similar to the NLRB’s role
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1 as petitioner in the Section 10(e) enforcement action. *See* 29 C.F.R. § 101.14 (“If the respondent
2 does not comply with the Board’s order, or the Board deems it desirable to implement the order
3 with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or,
4 the respondent or any person aggrieved by a final order of the Board may petition the circuit
5 court of appeals to review and set aside the Board’s order.”). Indeed, the appeals and
6 enforcement proceeding are arguably “duplicative,” and where a Section 10(e) enforcement
7 proceeding has commenced, “no separate [Section 10(f)] proceeding is needed on the part of the
8 person thus brought into court.” *Ford Motor Co. v. NLRB*, 305 U.S. 364, 369-70 (1939). The
9 NLRB’s involvement in the three appeals is thus equally intended to enforce the Board Order
10 pursuant to its police and regulatory power, which brings those actions within the scope of
11 Section 362(b)(4).

12 Moreover, even if there was some private nature to the petitions for review (which there
13 is not), the fact that the NLRB’s cross-application for enforcement was consolidated with three
14 petitions for review of the Board Order does not justify subjecting the NLRB’s enforcement
15 action to the automatic stay. Just the opposite. The Ninth Circuit consolidated these cases based
16 on the NLRB’s uncontested motion informing the Court that the four cases “arise out of the same
17 Board proceeding and involve the same parties, the same legal issues, and the same Board
18 Order.” (Docket 23-632, ECF No. 19). Indeed, it is standard procedure that NLRB petitions for
19 enforcement of a Board order are consolidated with private party petitions for review of the same
20 order. Because the four proceedings involve the very same issue -- whether to enforce the Board
21 order -- if the three requests for review remain stayed, then that would have the effect of
22 impeding the NLRB from enforcing the Board Order. Such a result undermines the statutory
23 exception to the stay provided for in Section 362(b)(4) and does nothing to further the
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1 fundamental purpose of the automatic stay: preserving the property of the Debtor's estate. *See*
2 *Sternberg v. Johnston*, 595 F.3d 937, 947-48 (9th Cir. 2010) (overruled on other grounds) ("We
3 have explained the purposes of the automatic stay as twofold...enabling the debtor to try to
4 reorganize during a break from collection efforts and protecting creditors by preventing one []
5 from pursuing its own remedies to the determinant [of others]").


6 Additionally, the appeals do not fall within the "enforcement of a money judgment"
7 limitation on the police and regulatory exception to the stay, because they will not result in
8 recovery of a claim against the Debtor or interfere with property of the Debtor's estate. Section
9 362(b)(4) precludes governmental units from "enforc[ing].. a money judgment." 11 U.S.C.
10 § 362. Courts interpret this to allow actions falling within the police and regulatory exception to
11 proceed "'up to and including entry of a money judgment.'" *Cont'l Hagen Corp.*, 932 F.2d at
12 834, quoting *Edward Cooper Painting*, 804 F.2d at 942-43. Here, the consolidated Ninth Circuit
13 proceeding serves only to determine the rights of the parties. The NLRB will not use the
14 consolidated proceeding to collect monetary amounts from the Debtor's estate; indeed, as noted,
15 there are no such amounts at stake in the proceeding. Should any monetary remedies be realized
16 in subsequent proceedings, the NLRB would seek to secure them exclusively through the
17 pending bankruptcy proceeding. The IAM's description of "potential" future monetary claims
18 arising as a derivative result of the consolidated Ninth Circuit proceeding (ECF 79, p. 5 lines 8-
19 17) is speculative and has no effect on the application of the police and regulatory exception. The
20 IAM's assertion is further undermined by its later acknowledgment that there is no monetary
21 remedy sought in the enforcement proceeding. (ECF 104, p. 2, lines 21-22) ("[t]he only remedy
22 that the NLRB seeks is a notice posting and withdrawal of two grievances by the ILWU.").

1 Therefore, the requests for review do not constitute the enforcement of a money judgment, fall
2 within the scope of Section 362(b)(4), and are not stayed.

3 Accordingly, the NLRB requests that this Court grant the ILWU's requested relief and
4 enter an order finding the consolidated Ninth Circuit proceeding, including the NLRB's cross-
5 application for enforcement and the three petitions for review, is not subject to the automatic
6 stay.

7 Respectfully submitted,

8 **NATIONAL LABOR RELATIONS BOARD**

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22 Dated this 5th day of December 2023
23 in Washington, D.C.
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 5th day of December 2023, I filed hard copies of the NLRB's
3 Notice of Appearance of Interested Party and the National Labor Relations Board's Brief in
4 Support of Debtor's Application for the Entry of an Order Providing that the Automatic Stay
5 does not Apply to the Ninth Circuit's Proceedings Enforcing or Vacating an Order by the NLRB
6 with the U.S. Bankruptcy Court for the Northern District of California, San Francisco Division at

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7 I further certify that counsel of record for the Debtor, Trustee, U.S. Trustee, and IAM
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